

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 25 February 2004

BALCA Case No.: 2003-INA-37
ETA Case No.: P2002-CT-01318423

In the Matter of:

GEM LANDSCAPING,
Employer,

on behalf of

OSCAR SILVA GALLEGOS,
Alien.

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Appearances: Bernabe B. Diaz, Esquire
Danbury, Connecticut
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Gem Landscaping ("Employer") on behalf of Oscar Silva Gallegos ("the Alien") for the position of Landscape Gardener. (AF 27-28).² The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

²"AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On March 27, 2001, Employer filed an application for alien employment certification on behalf of the Alien for the position of Landscape Gardener. The job duties included planting, caring for and maintaining lawns, plants and flowers. Minimum requirements for the position were listed as two years experience in the job offered. (AF 27-28).

A Notice of Findings (“NOF”) was issued by the CO on May 28, 2002, questioning Employer’s ability to guarantee permanent full-time, year-round work for the petitioned position. (AF 12-14). The CO noted that the duties described in item 13 of the ETA 750A did not appear to constitute year-round employment in the area of intended employment, especially considering the severity of New England winters. (AF 13).

Employer was instructed to submit documentation demonstrating that the position is a year-round, full-time position in Brookfield, Connecticut. The CO requested “payroll records which clearly show that the employer has paid or is currently paying other Landscaper (sic) on a year-round basis.” Employer was also advised to list the duties the worker would be responsible for during the winter months and show that these duties constitute full-time employment of not less than thirty-five hours per week. In addition, Employer was instructed to re-post its job opportunity. (AF 12-13)

In Rebuttal, Employer stated that the prospective employee would perform various duties during the winter months, including brush clearing, pruning trees and tree takedowns, equipment repair and maintenance, masonry work, snowplowing, shoveling, and spreading salt and sand. Employer provided a list of maintenance customers, a list of snowplowing customers, and indicated that he had a master list with many customers who occasionally use his services. Employer indicated that in the past he had either performed the work himself or sub-contracted it out, hence he had no payroll records for

any winter employees. Employer argued that his business has been slowly growing and can now support a winter employee. (AF 5-11).

On October 18, 2002, the CO issued a Final Determination (“FD”) denying labor certification, based upon a finding that Employer had failed to establish that permanent full-time work was guaranteed for the job opportunity. The CO concluded that Employer’s rebuttal did not support the assertion that there is a bona fide full-time job opportunity, but was premised on business expansion. (AF 3-4).

Employer filed a Request for Review on November 18, 2002 and the matter was docketed in this Office on December 23, 2002. (AF 1-2). Employer filed a Statement of Position/Legal Brief on February 4, 2003.

DISCUSSION

Employer seeks labor certification for the position of Landscape Gardener. Citing the seasonal nature of the position and noting the severity of the New England winters, the CO advised Employer of the necessity to submit “convincing documentation” demonstrating that “the occupation of Landscaper is a year-round, full-time position in Brookfield, Connecticut.” (AF 12-14). Employer was instructed that documentation must include payroll records clearly showing current or past Landscapers employed on a year-round basis and must detail the duties that constitute full-time employment of no less than thirty-five hours per week.

In response, Employer stated that he does not have payroll records for an employee in the winter because up until now he could not justify the expense. Employer further states that he “ha[s] been slowly growing [his] business and now ha[s] plenty of winter work.” (AF 6).

The absence of a pre-existing position is not a *per se* bar to labor certification; however, an employer “must prove that it indeed has definite plans for business

expansion and that the expansion will generate full-time, permanent work.” *Mouren-Laurens Oil Co.*, 1991-INA-236 (Aug. 11, 1992). Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. Additional documentation is encouraged to bolster written assertions. The presence of such documentation influences the weight given to the employer’s assertions. *Marion Graham*, 1988-INA-102 (Mar. 14, 1990) (*en banc*).

Generally, the position of Landscape Gardener is seasonal in nature and the type of work performed is not full-time, year-round work. *Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1994) (*en banc*); *Crawford and Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*). We find Employer’s bare assertion of a “growing business” insufficient proof of the need for a full-time, year-round Landscape Gardener. While Employer provided a list of clients for whom he purportedly provides services, he produced no evidence of the volume of business such as billing statements or accounts receivable. He did not provide statements from customers or sub-contractors he claimed to have used in the past, or any other evidence which would substantiate his claim that he has enough winter work to support a full-time, year-round Landscape Gardener. Employer provided no documentation to support his assertion of increased business and to substantiate a demand for a full-time, year-round worker. Thus, labor certification was properly denied.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.